IN THE

Supreme Court of the United States,

OCTOBER TERM, 1876. NO. 721.

MARY A. PEARSON, et al.,
PLAINTIFFS IN ERROR,

vs.

JOHN YEWDALL, et al.,
DEFENDANTS IN ERROR.

THE PETITION

OF

MARY A. PEARSON, JANE C. HEYL, CAROLINE C. HARRIS AND MARGARET DELK, FOR LEAVE TO AMEND WRIT OF ERROR.

JOS. R. RHOADS,
F. CARROLL BREWSTER,
Attorneys for Plaintiffs in Error.

Chandler, Pr., 306 & 308 Chestnut St., Phila.

IN THE

Supreme Court of the United States,

OF OCTOBER TERM, 1876. NO. 721.

In the matter of the proceeding wherein MARY A. PEARSON, JANE C. HEYL, CAROLINE C. HARRIS, and MARGARET DELK are Plaintiffs in Error;

and

JOHN YEWDALL and ANNE J. YEWDALL, are Defendants in Error.

SUR WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable Morrison R. Waite, Chief Justice, and the Associate Justices of the Supreme Court of the United States:—

The petition of Mary A. Pearson, Jane C. Heyl, Caroline C. Harris, and Margaret Delk, respectfully represents: —

1. — That your petitioners have been advised that William

S. Stokley, the Mayor of the City of Philadelphia, has, by petition to this Honorable Court, suggested that the said City of Philadelphia has not been named as a defendant in error in the above proceeding; and praying the Court for leave to move to dismiss the writ of error because of the omission to name the said City of Philadelphia as a defendant in error.

II. — Your petitioners show that they did not name the said City of Philadelphia as a defendant in error for the reason that the only part taken by the said City in the Court below was to unite with your petitioners in objecting to, and filing exceptions to, the Report of the Jury complained of by these petitioners.

And in support of this averment your petitioners respectfully refer this Honorable Court to the two sets of exceptions filed by the said City to each Report of the Jury, the one at page nine, and the other at page fourteen of the printed record. In both of which it is complained in the fifth exception that damages were awarded against the City.

III. — And your petitioners further show that the docket entries of the Supreme Court of the State of Pennsylvania (page 22 of the printed record) show that the only parties appearing in said Court, and opposing your petitioners' appeal therein, were the said John Yewdall and Anne J. Yewdall. And your petitioners further show that if, in the judgment of this Honorable Court, it is proper that the said City of Philadelphia should be made a party as defendant in error, the defect can be remedied by reference to the record accompanying the

writ of error, and is entirely a matter of form. That said defect has not prejudiced, nor will an amendment thereof injure, the other defendants in error.

Wherefore, your petitioners pray your Honorable Court to allow an amendment of said writ of error by making the said City of Philadelphia a party thereto as defendant in error, with the same force and effect as if said City had been originally named as a defendant in error, and with leave to your petitioners to serve upon said City of Philadelphia a copy of the writ of error, *nunc pro tunc*, and also a citation to appear in twenty days from the date thereof.

And your petitioners will ever pray, etc.

STATE OF PENNSYLVANIA: —
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

being duly according to law, says that she is one of the above named petitioners, and that the facts set forth in the foregoing petition are true and correct, to the best of her knowledge, information and belief.

and subscribed
before me this
day of
A. D. 1877.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1876. *No.* 721.

IN THE MATTER OF THE PETITION OF MARY A. PEARSON AND OTHERS, INCIDENTAL TO THE PROCEEDING IN THE SAID COURT WHEREIN THE SAID

MARY A. PEARSON, ET. ALS.,
are Plaintiffs in Error,

AND

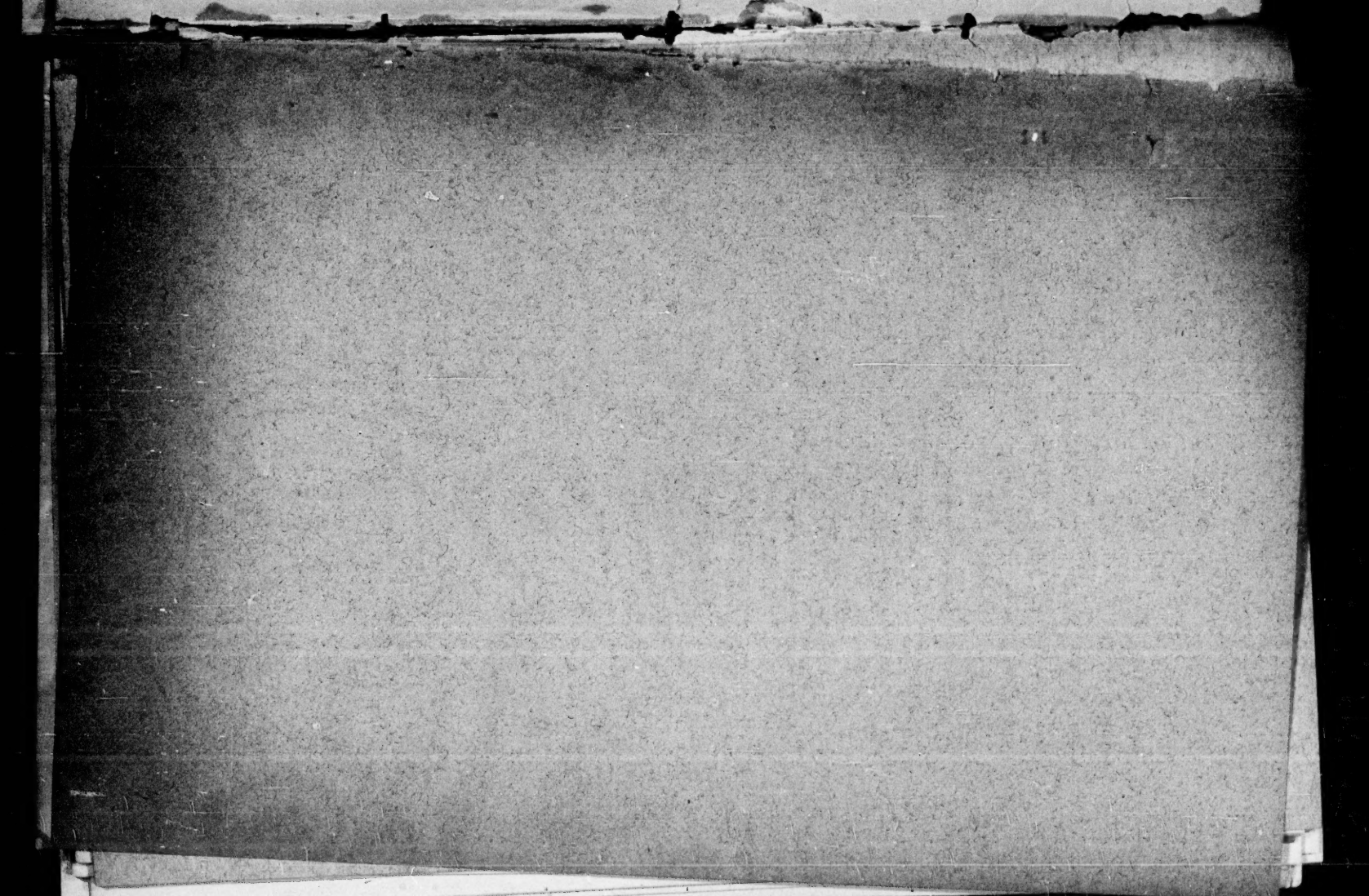
JOHN YEWDALL, ET AL.,
are Defendants in Error,

WHEREBY THE PETITIONERS PRAY FOR AN ORDER ALLOWING AN AMENDMENT OF THE WRIT OF ERROR, SO AS TO MAKE THE CITY OF PHILADELPHIA A PARTY DEFENDANT IN ERROR.

ANSWER OF

JOHN YEWDALL AND ANNE J. YEWDALL
to the said Petition.

WILLIAM W. WILTBANK,
Attorney for John and Anne J. Yewdall,
Defendants in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1876. *No.* 721.

In the matter of the petition of MARY A. PEARSON, and others, incidental to the proceeding in the said Court, wherein the said MARY A. PEARSON, and others, are plaintiffs in error, and JOHN YEWDALL, and another, are defendants in error, whereby the petitioners pray for an order allowing an amendment of the writ of error, so as to make the City of Philadelphia a party defendant in error.

The Answer of JOHN YEWDALL and ANNE J. YEWDALL to the said petition.

I. These respondents have, on the 26th day of October, 1877, been notified of the filing of the said petition, in answer to their argument, sur their motion for an order of dismissal of the writ of error because the City of Philadelphia is not made a defendant in error therein. That argument is submitted with their motion of November 12th instant, and

was delivered to the plaintiffs in error on the 19th of October last, or seven days before these respondents were notified of the filing as aforesaid of the said petition, and were required to answer the same.

II. These respondents submit that the prayer of the said petition should not be granted, and show to this Honorable Court that, although, as it is averred in the second paragraph thereof, the said City did file exceptions to the report of the jury complained of by the petitioners, and so far opposed the said report, yet the then action of the said City was taken, not because the said City *united* with the petitioners, who excepted, because the compensation allowed by the said report was *inadequate;* but because she was opposed to them, and deemed the allowance *excessive;* and insisted that, as against her, *no compensation whatever should have been recommended.* This appears from the substance of the exceptions of the City, of record, and specifically referred to by the petitioners. So that the City of Philadelphia was then as clearly antagonistic in interest, and in her attitude, to the petitioners, as she is now. And this fact is further indicated by the official report of the adjudication of the cause, to be found in the 81st volume of the Pennsylvania State Reports at page 118, which official report shows

the appearance of the City in support of the judgment of the Sessions, and thus affords also an answer to the averment of the third paragraph of the petition to the effect that the docket entries of the Supreme Court of Pennsylvania suggest that the only parties appellees were these respondents. The docket entries are not a part of the records of that Court, and afford conclusive evidence of nothing. It is submitted, that the reason alleged by the petitioners, therefore, for their omission of the City as a defendant in error is frivolous.

III. These respondents submit further, that, because the City of Philadelphia heretofore presented her petition to this Honorable Court praying that she be permitted to interpose for a special purpose, it does not follow that the prayer of the petition now answered to should be granted, inasmuch as the petition of the City of Philadelphia was conceived with a view to her being enabled at once to take steps for the dismissal of the writ of error (so far as by law it was her privilege to do), and she sought to appear of record merely to that end; whereas the petition now considered seeks to bind her to a protracted litigation, on grounds which she is advised are untenable; and in the meanwhile to suspend the advance of an improvement, essential to the welfare of her citizens in a populous district, and desired by all but the plaintiffs in error here.

IV. These respondents further submit that there is no warrant in law for the amendment and the citation prayed for, and that the prayer of the said petition should be denied.

JOHN YEWDALL,
ANNE J. YEWDALL.

WILLIAM W. WILTBANK,
Attorney for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1876. No. 721.

IN THE MATTER OF THE PROCEEDINGS IN ERROR,

Wherein

MARY A. PEARSON, ET AL.,

are Plaintiffs in Error,

and

JOHN YEWDALL AND ANNE J. YEWDALL,

are Defendants in Error.

MOTION THAT WRIT OF ERROR BE DISMISSED, AND ARGUMENT.

WILLIAM W. WILTBANK,

Attorney for John and Anne J. Yewdall,

Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Of October Term, 1876. *No.* 721.

MARY A. PEARSON ET AL.

v.

JOHN YEWDALL ET AL.

And now to wit: , 1877, the defendants in error, by William W. Wiltbank, Esquire, their Attorney, move for an order of dismissal of the writ of error, because the City of Philadelphia is not named as defendant in error in the writ.

STATEMENT OF THE CASE.

This cause comes before the Supreme Court of the United States, on writ of error to the Supreme Court of Pennsylvania. It originated in the Court of Quarter Sessions of the Peace, in and for the county of Philadelphia, wherein proceedings had been instituted for the ascertainment, and due as-

sessment of damages, sustained (among others by the present plaintiffs in error) by the opening of a public highway in Philadelphia. The City of Philadelphia, by ordinance, directed, as under the law of the State it was competent to do, that the highway called Paschall street, which theretofore had been indicated on the plans of the city as to be opened in the future, should be forthwith taken for the use of the public; and as a preliminary step thereto, a jury was appointed by the court last mentioned, to examine the premises, and to report what moneys, if any, should be paid the property owners as compensation for the land of which they were to be deprived. All the proceedings thus had, appear by the record which is filed in this cause; and they were had in compliance with the provisions of certain acts of Assembly of Pennsylvania, which will be hereinafter referred to. Among the property holders who appeared, and were heard by this jury, were the present plaintiffs in error, who produced witnesses in their own behalf, and were represented by counsel. The City of Philadelphia was necessarily a party, at the office of whose solicitor (*vide the record, pp.* 7, 8, 9, 10), the meetings of the jury were held, according to the rule in road cases; and when the jury had completed their labors, they reported, as to the present plaintiffs in error, that they would be compensated for the property to be taken from them

by the payment by the city of twelve hundred dollars, which sum the city was directed to pay.

The report of this jury was filed in the Court of Quarter Sessions, where exceptions were formally taken to it by both the city and the present plaintiffs in error, the former claiming thereby that the sum awarded was excessive; and the latter that it was too small. (*Record, pp.* 13–14.) In addition to which the present plaintiffs in error excepted:—"IV. That the proceedings to assess damages in this case are in conflict with Article V and Article VII of the amendment of 1789 to the Constitution of the United States, which provides that no person shall be deprived of his property without due course of law, and that in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." (*Vide Record, p.* 17.) This was their only exception suggesting a federal question; a question of law growing out of the Constitution of the Federal Union. It, with three others, relating to the process under the State law, was filed on the 28th May, 1873. On the 12th November, 1873, the Court of Quarter Sessions overruled all the exceptions to the report of the jury, and confirmed the said report by final order.

On the 9th of May, 1874, on application to one of the justices of the Supreme Court of Pennsylvania, a writ of certiorari was allowed, whereby the record

was carried to that Court from the Court of Quarter Sessions. (*Vide Record, page* 18.)

In order the more intelligibly to indicate the history of the case in the Supreme Court of Pennsylvania, and to show how the City of Philadelphia is closely interested in the proceeding, the following brief account of the road law of that State is submitted:

The Royal Charter from Charles II to William Penn bears date the 4th of March, 1681, in the thirty-third year of the reign of that king.

Taking by this charter more than forty thousand acres, and led to the ownership as the best apparent means for the extinguishment of a debt due his father, William Penn would have found his acquisition a misfortune, had he not succeeded in his admirable plans for the securing and encouragement of purchasers and adventurers. In what was called his Instrument of Conditions and Concessions to those who first bought tracts of land from him, he made provisions for the accommodation of the settlers upon advantageous terms. At a convenient site on the river Delaware, "the most convenient Place upon the River for Health and Navigation," a certain plot of ground was to be laid out for a city and every purchaser was to enjoy absolutely within its limits ten acres to every five hundred of his purchase without, providing that the place was exten-

sive enough to allow it. Thus, owning tracts or districts in themselves far removed from each other, and anywhere in the Province, the newcomers not the less were to enjoy a common centre, or town settlement, in which they likewise were to be interested, to an extent proportioned to the extent of their possessions in the wild country beyond. It will be observed that by this arrangement of a man's lands in the province, two acres per one hundred acres were to be urban, and the balance was to lie at a distance more or less remote therefrom. In order to effect this, a plan of the proposed city was to be made, and the persons concerned were to draw their sites by lot. But not to encounter the risk of permitting the people in any instance to establish themselves either in town or country in a manner likely to be prejudicial to the community at large, Penn secured the reservation of streets in the town and of highways in the country, before any final settlements were made. In the Conditions and Concessions, he stipulates: "But it is to be noted that the Surveyors shall consider what Roads or Highways will be necessary to the Cities, Towns, or through the Lands. Great Roads from City to City, not to contain less than Forty feet in Breadth, shall be first laid out and declared to be for Highways before the Dividends of Acres be laid out for the Purchaser, and the like Observation to be had

for the Streets in the Towns and Cities, that there may be convenient Roads and Streets preserved, not to be encroached upon by any Planter or Builder, that none may build irregularly, to the Damage of another. *In this, Custom governs.*"

Practical difficulties were found to prevent the accomplishment of Penn's object in the manner which he proposed; but the object itself was never lost sight of, and, accordingly, a new plan was devised for the distribution of the city lots, and the streets dividing them; and, in the course of time, also, as experience developed the need and manifested the means, public roads in the country were secured. The results about to be briefly indicated flowed from the undisputed, indeed indisputable, assumption of sovereign right in the proprietary governors, under the crown of England, to make and establish such thoroughfares as they deemed proper, using for such purpose, not lands of the settlers, but lands which, by the provisions of the instrument of Conditions and Concessions, and of the other instruments later executed, were never granted away, or, if granted away, were granted subject to be appropriated upon the contingency arising of the demand for a highway. Thus when (in 1682) the extent of purchases was estimated, it was ascertained that at least three hundred thousand acres

had been bought, so that, in order to give each man two acres per cent. of his acquisition in a town, a city of six thousand acres was required. The intention to form such a city was not for a moment entertained. So, also, when the commissioners charged by Penn to represent him in the premises, proceeded to lay out "Great roads from City to City not to contain less than forty feet in breadth," before they made surveys for the new owners, in order that the great roads themselves might be omitted from the grants, and remain in the proprietaries for all time, they encountered an insuparable obstacle in the fact that they had but one city, and no indication whatever of where, or when, even one other, much less many others, would afterwards grow up. It is unnecessary here to note how an arrangement was made which proved satisfactory, for the laying out of Philadelphia, as that difficulty, although fully elucidated in the local histories, has no connection with the subject to be illustrated in this brief. The district through which Paschall street is designed to run was then in the country. Public roads in the country, however, were located at first without any difficulty whatever by the direction of the governor and his provincial council, whose acts in this respect were by far more likely to be accelerated than obstructed by a very limited population, inhabiting a wilderness, and eager to

enjoy facilities for a communication which no other power could secure to them; and the power of the governor and council, by Penn's Frames of Government, was absolute. Of these documents there were three in all. On the 5th of May, 1682, he published his first, whereby he provided that the functionaries named "shall at all times settle and order the situation of all cities, ports and market towns in every county, modeling therein all public buildings, streets and market places, and shall appoint all necessary roads and highways in the Province." On the 2d of February, 1683, he published another; and on the 7th of November, 1696, a third; each of which contained provisions for highways similar to those of the first. The Colonial Records of the Province exhibit many instances of the action of the Governor and his Council, in each year, in the exercise of the authority thus bestowed upon, and confirmed to, them; and there was at no time prior to the year 1800 any claim advanced by any person, nor, indeed, was there any ground for claim, for compensation for land taken.

The reason of this was, that, by the unvaried practice of the authorities in making grants of land to first holders, in addition to the tract bought, there was granted gratuitously some land, to be appropriated in the future to roads, the amount of which was estimated by a settled rule. At first, a

man was allowed for nothing, it would seem, ten acres to every hundred for which he made return. Finally, the allowance came to be six acres for every hundred. And at length there was passed an act of Assembly in 1712, providing as follows:

"That for all lands hereafter to be taken up, or surveyed in this province, the surveyor, that lays out the same, shall allow for roads and barrens, after the rate of six acres for every hundred acres to the owner of such lands, for which said allowance of six per cent. no rent shall be paid to the proprietary, his heirs or assigns:" (2 Smith's L. 139)—an act which was repealed by Queen Anne in Council, February 20, 1713, but which established a custom that prevailed always. (Smith cites authorities 2, 140.)

It followed from this, and has always been held in Pennsylvania, that, by virtue of the original concession, and covenant of grantor and grantee, in effect, by reason of the present of six acres of land as the accompaniment of every purchase of one hundred, which had been enjoyed by the first holders after the proprietaries in the line of every title in the State outside of the old cities, when the sovereign power, from time to time, laid out public highways, no man suffered the loss of any land whatever. The State, or the province, was merely appropriating what had been previously reserved to its own

use, and, during an interval of time, used by a citizen. The uninterrupted enjoyment during the interval was a part of the consideration of the covenant to hold, subject to the exigencies of a public demand. "In this plan," said Chief Justice Shippen, in 1802, "there was evidently a chance that the purchaser might be either a gainer or loser in the event, as it was then, and would probably continue for a long time uncertain how much of each man's land would be found necessary for such public roads. The quantity of six acres per cent. was, however, fixed as the permanent quantity to be added to every man's land for that purpose; and from that early period to the present time no grant has been made, either by the proprietaries or the commonwealth, without the addition of six per cent. expressly for the purpose of contributing to the establishment of roads and highways." * * * * * "Although in this early arrangement there might be a chance that certain purchasers might be obliged to contribute more than six per cent. to the roads, yet it might possibly be foreseen that scarce any instance of that would occur, without an equivalent likewise accruing to the purchaser, from the vicinity of such public roads to their buildings and improvements." McClenaghan *vs.* Curwin, 3 Yeates, 362.

The erection of Pennylvania into a State did not alter the then existing system of road law; and this

was adjudged in 1802, and, indeed, has been from time to time, up to a very recent period.

On the 28th September, 1776, the first constitution of Pennsylvania was established. On the 28th January, 1779, there was enacted a law, which, as the last of a series of statutes, "formally divested the proprietaries of their estates under the charter, and vested them in the commonwealth." On the 2d December, 1790, there was ordained the second constitution of the State.

In the declaration of rights of the constitution of 1776 are to be found many assertions of the absolute right of property;—the "natural, inherent and unalienable right"—"of acquiring, possessing and protecting property." It is prescribed that "no part of a man's property can be justly taken from him, or applied to public uses without his own consent, or that of his legal representatives." The article XI provides, "That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred." And the 25th section of chapter II provides that "Trials shall be by jury as heretofore," &c., &c.

Turning to the constitution of 1790, we find provisions of similar import:—"nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." (Decl.

of Rights IX)—"That trial by jury shall be as heretofore, and the right thereof remain inviolate."

Allowing their full significance to these provisions, the authorities hereafter to be cited agree, that the first and second constitutions of the State, and the act called the Divesting Act, had no effect upon what has been called the system of road law which antedated them. The act did not impair the binding force of the covenant based upon the allowance of six acres per hundred acres. The fundamental charts, or FRAMES, did not create, in behalf of a landholder, either a right to demand compensation for land taken for a highway, or a right to urge that, at all events, the taking involved a controversy, and that in such a controversy he must have the privilege of a trial by jury. Nor can there be found, nor has it ever been pretended that there can be found, in the words or the spirit of any one of the three important instruments referred to, warrant for the argument that the solemn declaration, "nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land," —necessitated a trial by a jury of twelve men, in every case ending in a legal change in the possession of property. Courts with chancery powers were created; tribunals to direct the devolution of estates, to appropriate lands, otherwise the heir-at-law's, to the payment of debts;—these were created

without reference to a jury trial, whilst constituting a machinery for the deprivation of vast estates "by the law of the land." But beyond this, as touching roads, the unanswerable argument was, *that no man's property was taken; the State merely resumed possession of property already her own.*

The case was without the scope of the guaranty, by the sanction of the constitution, of the citizen's security in the enjoyment of his own. It was not *his own* of which the State deprived him when she made a road. But as to what really *once* was his, and was taken from him in the procedure, a remedy had been provided as far back as 1700. From that time the authorities allowed him the value of *improvements* which he had put upon the land. He recovered the equivalent of that which legally he had lost in deliberately affixing it to the realty. This, obviously, the authorities were not bound to permit, but it was certainly expedient that they should do so. In attaching his own property to the soil of another, he ran a risk of which it would have been perhaps unjust, and beyond question unwise, to teach him the consequences. Accordingly, a jury was created for such a case.

Reference is now made to the act of 1700.

In that year, the twelfth of William III, there was published "An act to empower the justices in each county to lay out and confirm all roads, except the

King's highways and public roads;"—the object of which was, to declare the existing law, that the King's highways were to be laid out by order of the governor and council for the time being; and to be recorded in the council book; and further, to enable citizens living off a public road to obtain a highway thereto. In this last case the provision was, that the justices of each county court should, whenever complaint was made of the want of such a road, appoint six viewers, to examine in the premises: "and if the said housekeepers, or any four of them, are satisfied that there is occasion for a road or cart-way to be laid out, according to the complainant or complainants desire, then they shall and may lay out the same, in and through such convenient places as they shall think may be least to the damage or inconveniency of the neighbors or parties concerned, and least injurious to the settlements thereabouts; and of such breadth as the justices shall order or appoint, so that it exceed not fifty feet; and shall make return thereof under their hands to the next county court, after it is laid out; and if then and there the justices approve the same, it shall, at the same court, be entered upon record," &c., &c.

Adjoined to this section we find the first provision of law in the province, looking to the payment of compensation in the exercise of the right of eminent domain. "*Provided*, That no such road shall be

carried through any man's improved lands, but where there is a necessity for the same; and where that appears, the respective county court shall appoint six indifferent men to view and adjudge the value of so much of such improved lands as shall be taken up for the use aforesaid, and the value thereof shall be paid to the owner of the said land, out of the respective county stock." (*Hall and Sellers' Laws of Pa., p.* 9.)

This was the *due process of law*, in that ancient time, and long before Pennsylvania was a State, provided for the citizen in the case suggested; and the machinery thus created has been continued, with slight change, ever since. By this legislation a man might, under the circumstances indicated, in the case of a road, *not* the King's highway or a public road, appear before a jury of six men, and claim compensation for *improved* lands taken. The interpretation of this provision precluded, for a century, the allowance of money for the land itself; the *improvements* only were rated.

In 1735 (IX. G. II., Cap. II., Hall & Sellers, 188–9), the provision for payment in county stock was repealed; and it was enacted that the damages should be fixed "by the person or persons at whose request, and for whose use the same was laid out, and by those who shall use the same as a common road to and from their own dwellings."

In March Term, 1802, in McClenaghan, Curwin (*ante*), the Supreme Court of Pennsylvania, by Chief Justice Shippen, discussed the road law of the State as thus hastily sketched, and certain of the remarks of the Chief Justice have already been quoted in this brief. The decision then reached by the court was important, because it declared the law to be, that the act of 1700, just quoted, did not contemplate compensation for anything but *improvements*, having no relation to the land itself; and that the continuance of the provincial system after Pennsylvania was a State, was not in violation of her constitution. In that case the question turned upon the validity of an act of Assembly of 1792, empowering a turnpike company to make an artificial road.

"The validity of the act," said the court, "is impeached by its being repugnant to the constitution of Pennsylvania, which directs that no man's property shall be taken for public use without his own consent, or that of his legal representatives, nor without compensation.

"To this it is answered, that the road, or track of the road running through the plaintiffs' land was not his separate property, for that he held it as a trustee for the public, under the grant of the late proprietaries of Pennsylvania, in which he was allowed beyond the quantity of land actually purchased and paid for, six per cent. for roads and highways."

Whereupon there was stated at length the law of the State; and the court adjudged: "We can not, therefore, consider the Legislature's applying a certain portion of every man's land for the purposes of laying out public roads and highways, without compensation, as any infringement of the constitution; such compensation having been originally made in each purchaser's particular grant."

Mr. Justice Brackenridge subjoined, "that it ever had been his decided opinion, that in all cases of roads laid out by order of the county courts, where they had been carried through a man's improved lands, the soil of the land was not to be valued and paid for either by the county or the petitioners, but merely the improvements." Of course it was not pretended that the unimproved lands should be for a moment considered.

Later in date than the decision in the case just cited, the Legislature of Pennsylvania passed an act (of April 6th, 1802), by which the same procedure, before a jury of six men, of whom only four need act, was provided for the case of the proposed opening of a road, as well as for the ascertainment of damages sustained; but the legislation immediately relating to the present subject, was new, in this, that it contemplated the allowance of compensation where damage was shown to be sustained, in the case of *all public roads whatsoever*, and thus indicated

the loss of the old distinction between the king's highways and public roads running thereto; and it directed that damages sustained should be paid out of the county stock. As to *private* roads the distinction was retained; and they were and to this day are to be opened and paid for by the persons who enjoy them. The act of 1802 remained the general law in this relation until 1836, when, in accordance with a report of a Commission empowered to revise the statutes of the State, a new and even more comprehensive act was passed, which, modified only slightly by later statutes, has remained operative ever since. By the act of 1836 a jury of six men, called a jury of view, is appointed by the Court of Quarter Sessions of a given county, in which citizens desire a new road, to report upon the expediency of the measure proposed, and if, after proper process, and the consideration of the court, the new road is approved, and is opened, another jury, consisting also of six men, is upon petition appointed to ascertain if the property owners whose lands have been taker have sustained damage thereby, and if so, to what extent.

The act of 1836 provided, as did the act of 1802, that, in estimating damage alleged to have been suffered, the jury might consider the loss in land, but must make allowance for the advantages caused by the opening of the new road. It also created a

system special to the City of Philadelphia, whereby her body of Councils were authorized under certain circumstances to take the initiative in the opening of highways within her limits, without the intervention of the first jury of six men, usually called the jury of view; but with the consequence, that the second jury of six men, usually called the jury of damages, must be appointed by the court on proper petition filed. For the purposes of this statement, which is made merely to illustrate the contention of the defendants in error that the City of Philadelphia is necessarily interested in the cause, and that the writ of error must be dismissed because she is not brought in as a defendant, no further details of this line of statutes need be given.

Concurrently with the many principles of adjudication created by this statutory system, the Supreme Court of Pennsylvania, up to the time of the litigation which this narration illustrates, had announced the doctrine, established by the first constitution of the State, and a part of the fundamental law of Pennsylvania until a time later than the time of the judgment under review; that the compensation allowed for property of which a citizen was deprived by the sovereign act, must be the measure of the value *of the property taken*, and must *not* have reference to damages *consequent* upon the taking; *direct*, and not consequential, damages, in other words,

were alone to be ascertained and estimated by the juries.

In Workman *v.* Mifflin, 6 Casey, 362, 370, that tribunal, in 1858, by Mr. Justice Strong, said: "It must not be forgotten that even the owner of land, taken for a public highway, is entitled to compensation only as a thing of grace, not of right. The allowance of six per cent. in all grants, as well by the original proprietaries as by the Commonwealth, was itself compensation. And although in most of the statutes passed since the year 1700, relative to opening roads, provision has been made for assessing the damages of the land owner, through whose lands the new road has been opened, yet this has been accorded as a favor, and not because there was any obligation to make compensation."

The changes thus gradually wrought in the law of Pennsylvania in the nearly-two centuries, from the time of the Royal Charter to this day, are important in this connection, as manifesting the altered relations of the citizen holding land and the State. Certainly for the first half of the period, it was not disputed that, by virtue of the acts of the proprietaries, the government might appropriate land for the creation of highways in the exercise of an unrestricted privilege, free from any liability whatever to the owner. It has been constantly said in the old books, that this state of things did not result from a

system of law in England, but from a compact and reserved right, as between grantor and grantee, wholly unknown to the English constitution. The law of England can afford no analogy in the premises, and has certainly never afforded any rule of action. The supreme power in Pennsylvania could take such land as was required. But also in the time noted it had become obvious that the needs of the State did not always comprise the needs of the people, and that, therefore, the king's highways laid out in council were not all the highways which the farmers required. In the cities of Philadelphia, of Lancaster, of Chester, the streets provided by original charter were adequate to the demands of trade; but in the agricultural districts, where hundreds of acres of woodland lay between a homestead and a post road, the landed proprietors required public ways across the country. Accordingly, about twenty years after the purchasers and adventurers reached Pennsylvania, the machinery of a "road jury" was created; six householders of any county might report to the justices of the county, that the county itself required a road. Here the needs of the county were distinct from those of the State; and, if the justices approved, the road was made, and if made, it was paid for by the county. But still no citizen of the county was paid for any of *his land* thus thrown open to the public, and taken from himself.

He was allowed money for such improvements as he had put thereon ; stone barns, stables, domestic fruit trees uprooted, &c., &c. He was allowed nothing for forests and other property on unimproved tracts. And it is to be noted that the law which allowed him this was the law of William III, made at New Castle, and approved in privy council ; so that if reference may be had at all to the legislation of Great Britain in this connection, it must result in showing the creation by the mother country of the jury of six men.

The county having thus, independently of the State, acquired the right to open roads, it was soon found that, as the population of a county increased, and its wild lands were redeemed in greater quantities, the necessities of certain citizens within the county were greater than, or different to, those of others ; and hence, as before the needs of the State had not, in their satisfaction, involved the gratification of the demands of a county, so now the needs of a county at large did not comprise the needs of some of its citizens in certain localities. Important county roads were not enough. Certain districts wanted roads to themselves, to be open to the public at large, of course, but, from the nature of the case, not likely to be used by more than a few persons. Hence the legislation of 1735, (IX. Geo. II.,) making this practicable, but requiring that,

instead of the county, the individuals interested should, through the same machinery of a jury, pay the cost. Here the divergence of State interests from the interests of a locality was more plainly marked, but still the principle of law—of the fundamental law of the State—that the *land* was taken as already the property of the State, by virtue of the original reservation of the owner, under the king, was adhered to.

The separation, however, in diversity of interest, of a county from a State at large, and of a part of a county from a whole one, widened in the advance of the country in population and wealth, until, instead of a difference merely, there came to be an antagonism, and, under the Constitution of 1776, and the alterations thereto, although the same system of an inquisition by jury was, and until now has been, carefully preserved, this result was gradually brought about, that, whilst in the early days of the Province and of the Commonwealth, the citizen looked to the political authorities for the erection of desired highways, and had no claim for a return for so much of his land as was devoted to public use; now the political authorities, in proposing to open a road, must look to the citizen for his assent, and must, as a prerequisite to the improvement, pay him money, not only for his building destroyed, and like costs, but also for the land itself. In the case

of a municipal corporation within a State, like the city of Philadelphia, this antagonism often results in a suit, where the citizen is plaintiff and the city is defendant; and the Courts of Philadelphia county enjoin the city from proceeding in the necessary work until damages consequent to citizens therein are ascertained, and are either paid or secured to be paid. These damages are measured still by the jury of six men; and in the inquiry conducted by this jury the effort naturally is, on the part of all owners of property, to put the costs of the new street on the city; whilst on the part of the city it is either to obtain a report that the property owners themselves should pay, or else that the amount to be paid by the city shall be only a part of the whole, and then justly stated, and not extravagant. It is obvious that in such case there are all the features of a law suit, and as a party the city is closely interested, and mainly in two ways, viz.: She is interested as in danger of being charged with an unduly large sum of money, to be paid out of her treasury; and she is interested as the municipal authority seeking for the public, and charged with the important trust, to open a highway. In this position of an interested party she is often obstructed by designing and grasping persons, desirous of profiting by a large assessment of damages in their favor; and the law, in guarding the

rights of the public spirited, indirectly affords to such persons some opportunity for obstructive measures. But the city is protected by three provisions, which may be briefly stated:

First. Upon the report of a jury being confirmed by the Court of Quarter Sessions, to whom it is made, no proceeding in the nature of proceedings in error shall operate to prevent the city's immediately opening the new highway, in other words, no appeal to the Supreme Court of the State shall be of effect as a supersedeas, unless the writ, to carry up the record, is specially allowed by a judge of that court. (Act of 23d of March, 1829, 10 Smith's Laws, 302; Purd. II. 1287, pl. 121.)

Second. No report of a jury, appointed either to report upon the opening or widening of a street in Philadelphia, or the damages arising therefrom, shall be set aside unless in pursuance of some exception duly filed to such report, within a stated time, in the Court of Quarter Sessions. (Act of 3d May, 1869, P. L. 1247, Purd. II, 1287, pl. 122.) Thus the city must be informed at once upon what ground, and UPON WHAT GROUND ALONE, her action is resisted.

And *third.* "Notice of the meetings of the viewers to lay out, open, or vacate any street or highway, or assess damages therefor, shall be served at the Law Department of the city, and the solicitor,

or assistant, shall represent and protect the interests of the city in relation to all road matters, and countersign every order granted by the Court of Quarter Sessions, for the payment of road damages, and keep a register of all damages confirmed by the court, and of orders countersigned, which shall not be countersigned or paid until an appropriation therefor be made by Councils." (Act of 13th May, 1856, P. L. 568, Purd. II, 1288, pl. 128.) In the line of these provisions, it is established by the rules of the Court of Quarter Sessions, that "in all proceedings to obtain the laying out of any roads, streets, or alleys, or to obtain damage in consequence of such laying out or widening or appropriation to public use, notice of the time and place of meeting of either of said viewers or assessors of damages, shall be given to the City Solicitor and proof of the service of such notice is to appear upon the report of such viewers or assessors, and a copy of the notice given shall be appended to the same." And, also: "Notice to the City Solicitor shall be given of all motions made, or rules taken, in road cases—in default of which notice, no such motion or rule shall be heard." These provisions are briefly referred to here, merely as confirmatory of the otherwise patent truth, that the city is necessarily a party in interest.

These several requirements embody conditions precedent to the entertainment of any complaint of

a property holder—conditions prescribed by a power allowing a hearing as matter of grace.

Whilst thus the City of Philadelphia is protected, the property owners who are parties to the inquiry, in that their property is subject to be taken for public use in a given case, are brought in; and in proceedings before the Court of Quarter Sessions, as well as before the Supreme Court of the State they appear, as a matter of right, either to sustain exceptions to such findings as have been had, or to urge, against the exceptions of others, that a previous finding be affirmed.

It will be observed that the requirement of the act of 1829, hereinbefore referred to as embracing the FIRST particular of the protection afforded the city, was complied with, in that a special allocatur of one of the judges of the Supreme Court was obtained, and the record was carried up to that court. But the requirement of the act of 1869, as embracing the SECOND particular was not observed, for one assignment of error (No. X) in the court above had no relation to any exception filed to the report in the Court of Quarter Sessions, and embraced a subject of exception not before advanced at any stage. And although the provisions in behalf of the city embraced in the THIRD particular were obeyed in the Supreme Court of the State, they were neglected in the procedure whereby the present cause was in-

stituted in the Supreme Court of the United States.

The cause was heard by the Supreme Court of Pennsylvania, the city of Philadelphia and the defendants in error here, appearing as appellees; and upon consideration, the judgment of the Court of Quarter Sessions was affirmed. The city of Philadelphia thereby became liable to pay to the appellants (as the authorities were willing to do) the sum of twelve hundred dollars, with interest, as compensation for their land to be taken for the public use. It was claimed that this sum was inadequate, and that ten thousand dollars were justly demandable in the premises. In order, therefore, to reverse the proceeding, the cause was carried to the Supreme Court of the United States. In the cause, as pending in this court, the city of Philadelphia has not been cited to appear, as she should have been, nor was any notice of the proceedings in error given to the said city.

In the month of March, 1877, the Supreme Court of the United States made an order in the cause, as follows:

"It having been suggested that the city of Philadelphia was a party to this cause, in the court below, and adverse in interest to the present plaintiffs in error, leave is granted the defendants in error to move to dismiss, because the city is not

named in the writ, and for the city to appear by counsel, to be heard in support of the motion. Leave is not granted to renew the motion to affirm under rule 6."

ARGUMENT.

The city of Philadelphia is interested in the pending cause, inasmuch as the object of the plaintiffs in error is, in the face of her opposition, to reverse a judgment against her for twelve hundred dollars, in order that it may, if possible, be increased. Acquiescing in an order of the Court of Quarter Sessions, finding the damages of the land owners, the city appeared in the Supreme Court of Pennsylvania, in support of the adjudication, and prevailed there in her contention that the court below had proceeded correctly. She was closely concerned, to see that her treasury was not unduly charged. Having had no legal notice of the application to the Supreme Court of the United States, and having been excluded from the record by the plaintiffs in error, it is submitted that the writ of error should be dismissed, for it is asked here that a cause be determined to her prejudice, without affording her a day in court. *Terry* vs. *The Merchants' and Planters' Bank*, October Term, 1876, No. 31.

Where there has been no service of the citation, the case must be dismissed on motion.

Brown *vs.* Union Bank, 4 Howard, 465.
Hogan et al. *vs.* Ross, 9 Howard, 602.
Bacon et al. *vs.* Hart, 1 Black, 38.
Smith *vs.* Straden et al., 12 Howard, 327.

WILLIAM W. WILTBANK,
Of Counsel with Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1876. No. 721.

MARY A. PEARSON, ET AL.,
Plaintiffs-in-Error.

vs.

JOHN YEWDALL, ET AL.,
Defendants-in-Error.

Brief

Of Plaintiffs-in-Error, against the motion of "Defendants-in-"Error, for an Order of Dismissal of the Writ-of-Error, be-"cause the City of Philadelphia is not named as Defendant-"in-Error in the Writ."

It is respectfully submitted that the above motion should be denied for the following reasons: —

I.—It is out of time and season. The "authenticated transcript of the Rec-"ord" below was docketed in this Court September 27, 1876.

The notice of the present motion was received October 19, 1877.

Upwards of one year after the case has been in this Court, and after the lapse of several terms, this motion is made. It is believed that all Courts require that motions to dismiss shall be interposed at the first Term.

This was the distinct ruling, as to a motion to dismiss, where no citation had been issued. *Buckingham* vs. *McLean*, 15 Howard, 150, [1851].

II.—A motion to dismiss has already been fully considered and has been denied. A party has not the right to split his case into fragments, and present it to the Court piecemeal. Justice to the Court, and to an opponent, would seem to require that all the reasons by which a motion can be supported should be submitted at the time the motion is made. A different practice would lead to great vexation. Is a new motion to dismiss to be heard at every term, for every case on a heavy calendar?

The Record of this Court shows that
a motion to dismiss was made December 11, 1876.
That it was amended by adding a
motion to affirm December 20, 1876.
And that both motions were denied January 15, 1877.

The *question* of dismissing the writ is *res adjudicata*.

The general principle governing this point rules it against the motion.

If a Court of general civil jurisdiction give a judgment generally, for the defendant, it will be presumed to have decided the whole case, and not merely a particular branch of it. *Fourniquet* vs. *Perkins*, 7 Howard, 160. [1849. Opinion by DANIEL, J.]

Mr. JUSTICE NELSON, in *Stockton* vs. *Ford*, 18 Howard, 418, [1855,] said: —

"One of the questions now sought to be agitated again, "is precisely the same as this one in the previous suit, "namely, the right of the plaintiff to the judicial mortgage "under the execution and sale against Prior. The *other is* "*somewhat varied;* namely, the equitable right or interest "in the mortgage of the plaintiff, as the attorney of Prior, "for the fees and costs provided for in the assignment to "Jones. *But this question was properly involved in the for-* "*mer case, and ought to have been there raised and deter-* "*mined. The neglect of the plaintiff to avail himself of it,* "*even if it were tenable, furnishes no reason for another lit-* "*igation.*"

It is unnecessary to multiply citations upon this point. While it is not contended that the former ruling is an absolute bar, it is submitted that the convenience of the Court, and the alanogies of the law may well refuse a second hearing of the same motion.

III. — If the motion now made were presented in time, and had never been denied—still it is not presented by the proper party. The learned counsel making this motion is not the Solicitor of the City of Philadelphia, nor the assistant of that official.

The City did appear in this Court in March, 1877, without notice, however, to the plaintiffs-in-error, and, on a Petition signed by the Mayor and the City Solicitor, the Court made the following order, March 26, 1877: —

"It having been suggested that the City of Philadelphia "was a party to this cause in the Court below, and adverse in "interest to the present plaintiffs-in-error, leave is granted

" the defendants-in-error to move to dismiss, because the City " is not named in the writ, and for *the City to appear by coun-* " *sel,* to be heard in support of the motion.

" Leave is not granted to renew the motion to affirm under " Rule 6."

It will be seen upon inspection of the City's petition that the defendants-in-error joined therein, and that the prayer was not to dismiss the writ, because of the non-joinder of the City, but " that the Order heretofore made, over-ruling the " motion to affirm the judgment of the Supreme Court of " Pennsylvania, be vacated, and that they " (the petitioners) " have leave, *sec. reg.*, to file a Brief in support of said motion " to affirm."

This prayer was refused in the words of the Order already quoted : —

" Leave is not granted to renew the motion to affirm under " Rule 6."

But as upon the Petition of the City, thus presented, it would seem proper that she should be heard, the Court allowed " the City to appear by counsel." To the present day " the City " has not availed herself of this permission. She does not support the motion. Its only advocates are the original defendants-in-error.

How does it concern them that the City is omitted?

She was their fierce adversary below. She joined hands with us then in praying the Court to set aside the award. As she thought it too large, and we thought it too small (and that our constitutional right had been impaired), we both united in excepting to the finding of the Jury. (*See printed Record, pp. 9 and 14.*)

"Exceptions on Behalf of the City of "Philadelphia to the Report of the "Jury.

"The said City excepts to the said Report —

"1. — *Because the damages awarded to the heirs of Robert "Chapman, deceased, are excessive.*

"2. — (*Same as to other damages.*)

"3. — (*Same as to other claimants.*)

"4. — Because the Jury erred in awarding any damages to "any of the persons before named, inasmuch as the benefits "accruing to the respective properties owned by them were "fully equal to the injuries caused by the taking of their land, "by the opening of the said street.

"5. — Because the entire amount of the damages assessed "was charged upon the said City, and no portion thereof "upon persons who were benefited by the opening of the "said street.

GREW,
WILLSON,
Pro City."

In the face of this Exception, it is at least strange to assert that the City contended "that the Court below had proceeded correctly."

The plaintiffs-in-error do not pause to inquire whether, in the face of this Exception, the City can, or cannot, now wheel round and ask this Court to affirm a report to which she violently excepted below.

There is something in the definition of an estoppel by "a "pleading in a Court of Record which will preclude the "party"—worthy of consideration at the proper time. But for the present it is certainly a sufficient reply to an objection made by Mr. Yewdall, that it cannot concern him that the City is or is not a party. He was "content with the legality "of the proceedings, and with the award of the unconstitu- "tional Jury. They gave him no damages. (*Page 8 of Re- "cord.*) If dissatisfied, why did he not appeal?" How does it concern him that other parties object, and demand a regular jury trial? If the motion were amended and presented by the City, the authorities are conclusive that she also is too late. In *Buckingham* vs. *McLean*, 13 Howard, 150, (1851,) cited *supra*, the appellants gave no notice of their appeal to the appellee, but the Court held that the party should, "at "the first time he appears, give notice of the motion to "dismiss."

The City, as already stated, presented her Petition, and secured her leave to move last March. Since then she has remained quiescent. As MR. JUSTICE MCLEAN says in the case just cited:—

"A delay to give this notice may throw the other party "off his guard until the limitation of the Writ-of-Error may "have expired.

Suppose that in this case the limitation did not bar a new writ last March, but barred it now.

So, too, in *Carroll* vs. *Dorsey*, 20 How., 204, [1857,] TANEY, C. J.:—

"If he appears, it shows he had notice, and if he *makes no* "*objection, during the first term, to the want of notice, or to any* "*defect in the citation, he must be regarded as having waived* "*it.*"

In *Mussina* vs. *Cavazos*, 6 Wallace, 360, [1867,] the original Writ-of-Error never reached this Court. Yet the Court refused the motion to dismiss.

IV. — If this motion had been presented at the first Term, had never been denied, and was now brought forward by the City, still it should be refused, because the law gives a right to amend, and a Petition praying for leave to make the amendment was filed directly after the Order made last March. In view of the facts presented by this record, the plaintiffs-in-error might well omit the name of the City as a defendant.

(*a*) — The City was not the petitioner in the Court below. The actors there were Mr. Yewdall and those who united with him. (*p. 6.*)

(*b*) — Their counsel notified all the parties to appear before the Jury. (*p. 7.*)

(*c*) — When the first report was set aside, the same counsel notified all the parties to appear before the second jury. (*pp. 11, 12, 13.*)

(*d*) — The City was notified by him to defend her interests. (*p. 11.*)

(*e*) — She was treated as a defendant by the first Jury, and ordered to pay all the damages. (*p. 9.*)

(*f*) — The City excepted to this first report—(*p. 9*)—and had it set aside.

(*g.*)—The City was again made a defendant by the second jury, and again ordered to pay all the damages. (*p. 11*).

(*h.*)—The City, as a defendant below, excepted to this second award, and joined with us in contesting it. (*p. 14*).

(*i.*)—The Docket entries of the Supreme Court of Pennsylvania show that the City never appeared there, as she had the undoubted right to do, and that, in the Court of last resort below, the only contestants were the present plaintiffs and defendants-in-error. The writ which removed the record from the Quarter Sessions of Philadelphia to the Supreme Court of Pennsylvania, was a *certiorari.* To it all parties could appear who saw fit to do so. The City did not avail herself of that right.

At every stage, then, of the case, at which she appeared below, we found the City endeavoring to set aside this award.

Having a common purpose in view, after the filing of the awards, it would seem but reasonable that we should not regard the City as an antagonist.

Should this Court, on argument, reverse the judgment below, the City will be relieved from a payment she has always objected to as unjust. She will have her new trial before a full jury, and whilst we can ask for proper damages, she will be at liberty to ask that Mr. Yewdall, or any other party in interest, who may be found to be benefited, shall pay our damages.

This proper and just view of the case can lead to but one conclusion, that no prejudice has resulted, or can result, to the City from omitting her as a *defendant*-in-error.

If she wish to be joined as a plaintiff-in-error, we will, of course, interpose no objection.

If she prefer to be a defendant-in-error, we are again willing to add her as a party.

In reply to the Brief submitted on the other side, consisting of one page of argument, at the end of twenty-eight pages of statements — a rivulet of reasoning in a desert of allegations—it is submitted that the following analysis and answers will be found sufficient:—

I.—Eighteen pages are occupied with citations from statutes and decisions, by way of re-argument, of the motion to affirm the judgment. This Court has twice decided that the judgment shall not be affirmed except after oral argument.

It would seem an affront to the Court to accept the invitation, thus extended by our adversary, to re-argue a question twice set at rest in this case. But as he informs us, at p. 19, that all this learning is expended "merely to illustrate the contention of the defendants-in-error, that "the City of Philadelphia is necessarily interested in the "cause," it is proposed to submit respectfully a few plain statements in answer to these points:—

Upon the fact that, by a Statute of 1712, six acres were allowed to the purchaser of every 100 acres for "roads and BARRENS," the hypothesis is built that no man can under any circumstances recover damages "except for improvements."

The argument refutes itself.

(*a.*)—The declaration of rights, 1776, (cited by defendants-in-error, p. 11 of their brief,) prescribed that "NO PART of a

"man's property can be justly taken from him or *applied to* "*public* uses without his own consent, or that of his legal "representatives."

The framers of this Ordinance must have been strangely ignorant of their right to take 6 per cent. of every man's land, or they very liberally renounced their claim.

(*b.*)—The older law of 1700, (cited on opposite brief, p. 15,) "provided that no such road shall be carried thro' any "man's improved *lands*, but where there is a necessity for "the same; and when *that* appears the respective County "Court shall appoint six indifferent men, to view and ad- "judge the value of so much of such improved LANDS as "shall be taken up for the use aforesaid, and the value "thereof shall be paid to the owner of the said land out of "the respective County stock."

Here, again, was strange ignorance or generous renunciation, for without payment of any damage it is argued that there was an absolute right to appropriate six per cent. Why pay the owner for what did not belong to him? This question seems to have occurred to the defendants-in-error, for they say "no citizen was paid for any of his land. He was allowed for improvements."

But the law did not say that he should be compensated for "improvements" destroyed. They were rarely, if ever, pulled down; but the statute declared that the value of the *land* shall be paid "to the owner of the said *land*."

(*c*) — The subsequent Act of 1735 (cited p. 15 of opposite Brief,) also recognized the right to damages, by directing that they should be paid "by the person at whose request * * the same" (the road) "was laid out."

A most wholesome provision, the present existence of which would have prevented this litigation. For the defendants-in-error are the promoters of this street through the land of others, in the hope that a jury of six can always be persuaded to place the damages upon the City.

(*d*) — Passing these citations of the defendants-in-error, which directly recognize the right to compensation, the whole question is settled by the Supreme Court of Pennsylvania, in the case of *Sower* vs. *City of Philadelphia*, 11 Casey, (*35 Penna. St. Rep.*,) 231. The opinion of the Court (concurred in by Mr. Justice Strong) distinctly affirms the principle.

"The public authorities of the City of Philadelphia have no "right, under the Act of twenty-first of April, 1855, to open a "street, laid down on one of the public plans of the City, "through the lands of a private individual, until they have "given security for the payment of any damages to be sus- "tained thereby, although no Petition has been filed for the "assessment of such damages; *and they may be restrained "from so doing by injunction.*"

"Nor have they any such right under the Act of twenty-first "April, 1858, until the damages have been assessed and paid, "or secured to be paid, according to law."

Sower vs. *City*, 11 Casey, 231, has never been over-ruled, and is recognized in *Cox* vs. *City*, 11 Wr., 11, [1864,] and in *Norris' Appeal*, 11 Sm., 423.

The Court, in Sower's case, cite the Acts of April 7, 1849, April 3, 1804, April 21, 1855, and April 21, 1858, all of which recognize in distinct terms the right to damage for "*land*" taken.

In view of this, how vain to inquire into the law and practice of 170 years ago in order "to show how the City of Philadelphia is closely interested," by insinuating that the plaintiffs-in-error are not entitled to any damages. Their right to compensation has never been questioned. Can the State take off 6 per cent. in the last century from the original tract for her highways, thus exhausting the whole of the original allowance for "roads and barrens?" Can the County come along in the beginning of this century and take off another 6 per cent., and can the City seventy years after claim another slice, and make 18 per cent. out of an allowance of 6 per cent? Indeed, to do her justice, the City never so contended. She conceded our right to compensation either in damages or benefits, by opening the street, and complained that if we were to be paid, "no portion" of the damages had been charged "upon the persons who were benefited by the opening of the said street."

This being the law, and these the undisputed facts of the case, when we are here respectfully asking the common privilege of a hearing upon a constitutional question, is it any answer to suggest that, under the misquoted laws and misapplied citations, swept away by recent statutes and decisions, we have no right to recover anything?

This record shows that there is a constitutional question for discussion.

We presented it in the Quarter Sessions of Philadelphia, (*p. 17 of printed Record.*)

We repeated it in the Supreme Court of the State, (*p. 21.*)

We re-presented it to the Chief Justice of the Supreme Court of the State, when we petitioned for the allocatur, (*p. 2 of Record.*)

We satisfied this Court of its existence when the motions to dismiss and to affirm were both denied, January 15, 1877, and

again, when this Court, March 26, 1877, refused leave to renew the motion to affirm.

After all this, shall we never enjoy the privilege of arguing the true question?

II.—A single page of the opposite Brief is devoted to the argument (*p. 29*), of the only question now before the Court, to wit:—

"Shall the Writ-of-Error be dismissed because the City is "not named in the Writ."

Enough has been already cited from the Record to explain the omission of the name of the City. She, with us, objected to the award, and induced by her action the belief that she wished it set aside. No other inference can be drawn from her exceptions.

She was not, and is not, "*adverse* in interest to the present plaintiffs-in-error."

She, like them, has committed herself on the record against the award of the jury.

She was, and we may presume is still, dissatisfied. If so, she wishes a new trial.

Her exceptions mean this or mean nothing. The only difference between her and the plaintiffs-in-error is simply this, Shall the new jury be of six or of twelve men?

Surely then, she is not "adverse in interest."

Before a new jury she can argue again, "place all the da-"mages on the party in interest. The City receives no ad-"vantage from this street—let those pay who are benefited."

III.—If all this be incorrect reasoning, still, there is power to amend.

The Revised Statutes, (*section 1,005, p. 187,*) provide that:—

"The Supreme Court, may at any time, in its discretion and "upon such terms as it may deem just, allow an amendment "of a Writ-of-Error, where there is a mistake in the teste of "the Writ, or a seal to the Writ is wanting, or when the Writ "is made returnable on a day other than the day of the "commencement of the term next ensuing the issue of the "Writ, or when the statement of the title of the action *or par-* "*ties thereto* in the Writ is defective, if the defect can be "remedied by reference to the accompanying record, and in "all other particulars of form. *Provided:*—The defect has "not prejudiced, and the amendment will not injure, the de- "fendant-in-error." (See decisions—*Walden* vs. *Craig*, 9 Wh., 576, [1824,] MARSHALL, C. J., (*at p. 577,*)—It has been truly said that the power of Amendment is extended at least as far in the Thirty-second Section of the Judiciary Act, as in any of the British Statutes. *McVeigh* vs. *U. S.*, 8 Wall, 640. *Hampton* vs. *Rouse*, 15 Wall, 684.—(The Writ-of-Error in this case was returnable to a return day abolished by Act of Congress.)

Statutes of amendment are always liberally construed, and in furtherance of substantial justice. Mere technicality should never defeat a right to be heard. No possible harm can result from allowing the amendment. The City has yet ample time to prepare for argument of the main question.

The defect can, in the language of the Statute, be remedied by reference to the Record accompanying the Writ-of-Error, and is entirely a matter of form. The defect has not prejudiced, nor will an amendment thereof injure the other defendants in error.

Advancing the right—prejudicing no man—it is respectfully submitted to the Court to allow the amendment prayed for in the Petition.

JOSEPH R. RHOADS,

F. CARROLL BREWSTER.

Pro Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1876. *No.* 721.

MARY A. PEARSON, ET. ALS.,
Plaintiffs in Error,

AND

JOHN YEWDALL, ET AL.,
Defendants in Error.

MEMORANDUM

OF THE ORAL ARGUMENT MADE BY THE CITY SOLICITOR OF PHILADELPHIA, ON MOTION THAT WRIT OF ERROR BE DISMISSED.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1876. *No.* 721.

In the matter of the proceedings in error wherein MARY A. PEARSON et als. are Plaintiffs in Error,

and

JOHN YEWDALL et al. are Defendants in Error.

Memorandum of the oral argument made in behalf of the City of Philadelphia pursuant to the order of the Supreme Court of the United States heretofore entered, prefaced by a statement of facts.

STATEMENT OF FACTS.

During the October Term of 1876 the City of Philadelphia presented to this court her petition, setting forth, int. al., "That in all inquiries such as that exhibited in the proceeding above noted, involving claims for compensation or damage grow-

ing out of the exercise of her right to open streets for the public use, the said city was by law necessarily a party; that the said city had been a party to this cause as the same was pending, in all its stages from its inception before a road jury to its determination: and that in the said Supreme Court of Pennsylvania the said city had been duly represented as approving and upholding the order of the Court of Quarter Sessions, from which the plaintiffs in error now in this court had appealed. That the said city had there filed a brief. But that the plaintiffs in error in this court had not cited the said city to appear as of the defendants in error in this cause, nor caused to be lodged for the said city any copy of the writ of error; nor caused the said city to be in any manner notified of the proceedings in error here pending.

And further, the petition showed that, pursuant to authority granted by divers acts of the General Assembly of Pennsylvania, from time to time duly enacted, and by virtue of the provisions of various ordinances and resolutions of the Select and Common Councils of the said City of Philadelphia, the said city had directed that Paschall street, as it extended from Fifty-second street to Haverford street, be taken and opened for public use: and thereupon, and in order to the said taking and opening, a jury had been duly appointed to ascer-

tain what damages, if any, would be sustained by, and what compensation, if any, should be paid to, the persons whose land was thus to be taken. This inquiry had been instituted in the early part of the year 1871. All persons representing land appropriated to public use in Paschall street, excepting only the plaintiffs in error in this court, had long since assented to the appropriation, having assented in some instances without compensation, and in others upon compensation awarded by the jury. The extent of the said street between the termini indicated was about one mile. That it could not be opened through the property of the plaintiffs in error until a final judgment had been had in the present litigation or their claims had been otherwise provided for. The said city was informed that the sum of $1,933.33 was an adequate allowance to them; and this had been the judgment of the Court of Quarter Sessions, and of the Supreme Court of Pennsylvania; and that the sum suggested as their right, to wit, $10,000, could not, in the nature of things, be acquired. A large and populous district was thus deprived of a portion of an important highway; and should the cause remain to be heard by this court in its order, this deprivation, it might be anticipated, would continue for two or three years, to the hindrance of municipal improvements.

Wherefore the petitioner, William S. Stokley, Mayor of the City of Philadelphia, prayed leave of this court to appear by counsel in this cause as of the defendants in error, in order that the interests of the said city might further be duly advocated, under the law.

And the said petitioners, William S. Stokley, Mayor as aforesaid, John Yewdall and Anne J. Yewdall, defendants in error, prayed leave of this court to move for an order that, upon notice to the plaintiffs in error, in accordance with the rules of court, an order theretofore made, overruling the motion to affirm the judgment of the Supreme Court of Pennsylvania, be vacated, and that they have leave, sec. reg., to file a brief in support of a motion to affirm the said judgment.

Upon consideration of this petition, the court, in March, 1877, made an order as follows:

"It having been suggested that the City of Philadelphia was a party to this cause, in the court below, and adverse in interest to the present plaintiffs in error, leave is granted the defendants in error to move to dismiss, because the City is not named in the writ, and for the City to appear by counsel, to be heard in support of the motion. Leave is not granted to renew the motion to affirm under rule 6."

Under this state of facts the defendants in error

in the cause, to wit, John Yewdall and Anne J. Yewdall, have heretofore moved to dismiss, in accordance with the leave granted them; and the undersigned, as the law officer of the City of Philadelphia, duly authorized in this behalf, and availing himself of the privilege extended the City, presents this brief as a memorandum of his oral argument.

An effort to this end was made when the order of the court referred to was entered; but the undersigned, having been instructed by the clerk of this court, that the court would probably not hear argument after the 27th of April, found that there was not then a sufficient interval of time allowed the defendants in error to submit an argument upon the proper notice, under the rule of court, to the other side; and having, also, been requested by the learned counsel for the plaintiffs in error to take no action in the premises till this fall, in view of the proposed absence of the latter in Europe, he has been obliged to defer the presentation of his views in this important matter to this time. He has had the case to proceed as promptly as possible upon finding his opponent prepared to attend.

It may be premised that the municipal corporation thus permitted to address the court through her counsellor, can not be prejudiced by a special appearance, nor be held to have become a party to

a controversy which is deemed to be injurious to her in its prolongation, and from which she seeks to hold aloof, save so far as, by a proper exhibition of its ill effects, she may induce its final dismissal. The city protests that she is not a party to this record, as a defendant in error duly cited; and that her right to rely on this defect in the procedure cannot be impaired by her actual appearance to urge that right.

POINTS OF ARGUMENT.

The statement and argument filed by the defendants in error in this cause, in support of their motion of November 12th, 1877, is regarded as exhibiting an accurate, and a properly full, history of the Road Law of Pennsylvania; and it is here asked that that paper may be taken by this court as a part of the presentation of the case now made. The City adopts it, and relies upon it. And from it it appears clear that it is sought in this tribunal, in the face of her opposition, to reverse a judgment against her for something under two thousand dollars, in order that it may be increased to as near ten thousand dollars as possible.

The City regards this summary of the brief referred to as just and conclusive, to wit;—

The changes gradually wrought in the law of Pennsylvania in the nearly two centuries, from the time of the Royal Charter to this day, are important in this connection, as *manifesting the altered relations* of THE CITIZEN holding land and THE STATE. Certainly, for the first half of the period, it was not disputed that, by virtue of the acts of the proprietaries, the government might appropriate land for the creation of highways in the exercise of an unrestricted privilege, free from any liability whatever to the owner.

The supreme power in Pennsylvania could take such land as was required. But also in the time noted it had become obvious that the needs of the State did not always comprise the needs of the people, and that, therefore, the king's highways laid out in council were not all the highways which the farmers required. Accordingly, about twenty years after the purchasers and adventurers reached Pennsylvania, the machinery of a "road jury" was created; six householders of any county might report to the justices of the county, that the county itself required a road. Here the needs of the county were distinct from those of the State; and, if the justices approved, the road was made, and if made, it was paid for by the county. But still no citizen of the county was paid for any of *his land* thus thrown open to the public, and taken from

himself. Indeed, no citizen wanted to be paid. Each owner desired a road at the hands of the government. He was allowed money for such improvements as he had put thereon; stone barns, stables, domestic fruit trees uprooted, &c., &c. He was allowed nothing for forests and other property on unimproved tracts. He received a favor, and the idea of loss was impossible in the certainty of gain.

The county, having thus, independently of the State, acquired the right to open roads, it was soon found that, as the populution of a county increased, and its wild lands were redeemed in greater quantities, the necessities of certain citizens within the county were greater than, or different to, those of others; and hence, as before the needs of the State had not, in their satisfaction, involved the gratification of the demands of a county, so now the needs of a county at large did not comprise the needs of some of its citizens in certain localities.

The separation, however, in diversity of interest, of a county from a State at large, and of a part of a county from a whole one, widened in the advance of the country in population and wealth, until, *instead of a difference merely, there came to be an antagonism*, and, under the Constitution of 1776, and the alterations thereto, although the same system of an inquisition by jury was, and until now has been,

carefully preserved, this result was gradually brought about, that, *whilst in the early days of the Province and of the Commonwealth, the citizen looked to the political authorities for the erection of desired highways*, and had no claim for a return for so much of his land as was devoted to public use; *now the political authorities*, in proposing to open a road, *must look to the citizen for his assent*, and must, as a prerequisite to the improvement, pay him money, not only for his building destroyed, and like costs, but also for the land itself. In the case of a municipal corporation within a State, like the City of Philadelphia, this antagonism often results in a suit, where the CITIZEN IS PLAINTIFF and the CITY IS DEFENDANT; and the courts of Philadelphia county enjoin the city from proceeding in the necessary work until damages consequent to citizens therein are ascertained, and are either paid or secured to be paid. These damages are measured still by the jury of six men; and in the inquiry conducted by this jury the effort naturally is, on the part of all owners of property, to put the costs of the new street on the City; whilst on the part of the City it is either to obtain a report that the property owners themselves should pay, or else that the amount to be paid by the City shall be only a part of the whole, and then justly stated, and not extravagant. It is obvious that in such case there are all the features

of a law suit, and as a party the City is closely interested, and mainly in two ways, viz.: She is interested as in danger of being charged with an unduly large sum of money, to be paid out of her treasury; and she is interested as the municipal authority seeking for the public, and charged with the important trust, to open a highway. In this position of an interested party she is often obstructed by designing and grasping persons, desirous of profiting by a large assessment of damages in their favor; and the law, in guarding the rights of the public spirited, indirectly affords to such persons some opportunity for obstructive measures.

Now it was in this position that the City found herself in the controversy (from which she is here excluded) in every stage of the cause in Pennsylvania; and it was in this position that, in company with certain property owners, likewise interested, she prevailed in the Supreme Court of that State, in her contention, that the order of the court below should be affirmed. Reference is here specially made to the "*provisions for her protection*," *First*, *Second* and *Third*, set out on the 25th and 26th pages of the brief of Defendants in Error already quoted from.

The decisions of this court appear to sustain the

argument that, under these circumstances, the writ of error should be dismissed.

Terry *vs.* The Merchants' and Planters' Bank, October Term, 1876, No. 31.

Where there has been no service of the citation, the case must be dismissed on motion.

Brown *vs.* Union Bank, 4 Howard, 465.
Hogan et al. *vs.* Ross, 9 Howard, 602.
Bacon et al. *vs.* Hart, 1 Black, 38.
Smith *vs.* Straden et al., 12 Howard, 327.

Nor can the Plaintiffs in Error, at this late stage of the cause, force the City to appear as Defendant in Error. The section 1005 of the Revised Statutes does not contemplate a measure of such importance.

Charles K. J. Collis

Solicitor of the City of Philadelphia.